No. 785.

In the Supreme Court of the United States

OCTOBER TERM, 1943.

THE BALTIMORE TRANSIT COMPANY AND THE BALTIMORE COACH COMPANY, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION.

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OPINIONS BELOW

The opinion of the court below (R. III, 526–538)[1] is not yet reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. I, 1–152) are reported in 47 N. L. R. B. 109.

[1] In referring to the record, the same method is used as that followed in the petition for certiorari (Pet. 2, n.). Thus, the two volumes printed by the Board as an appendix to its brief in the court below are referred to as R. I, and R. II, respectively, and the volume printed by petitioners as an appendix to their brief in the court below, in which are also contained the supplemental proceedings in that court, is referred to as R. III.

JURISDICTION

The decree of the court below (R. III, 538–539) was entered on January 10, 1944. The petition for a writ of certiorari was filed on February 28, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the unfair labor practices of petitioners, who operate the only street railway and bus transportation system in Baltimore and in the course of their business import in interstate commerce substantial quantities of goods, affect commerce within the meaning of the Act.

2. Whether the Board is without power to remedy and restrain certain unfair labor practices in which petitioners engaged, because several years before commencement of the instant proceedings the Board refused, for asserted "lack of jurisdiction" over petitioners' business, to issue a complaint against petitioners upon charges alleging unfair labor practices not here in issue.

3. Whether, in view of the Board's earlier refusal to assume jurisdiction over petitioners, the Board abused its discretion in using the date of the issuance of its complaint to start the running of petitioners' liability for back pay and reimbursement of dues rather than the date of the decision and order.

4. Whether there is substantial evidence to support the Board's findings that petitioners interfered with, restrained, and coerced their employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8 (1) of the Act; interfered with, dominated, and supported two successive labor organizations of their employees, in violation of Section 8 (2) of the Act; and discouraged membership in two other named labor organizations by discriminating as to the hire and tenure of 10 employees, in violation of Section 8 (3) of the Act.

5. Whether, in the circumstances of this case, the Board abused its discretion in ordering petitioners to reimburse their employees for moneys checked off from their wages as dues to one of the company dominated and supported labor organizations.

6. Whether the Board abused its discretion in ordering petitioners to post notices that their employees are free to become or remain members of the specified labor organizations, membership in which petitioners had attempted to discourage, and that petitioners will not discriminate aganst the employees because of membership or activity in those organizations.

7. Whether, in the circumstances of this case, petitioners were denied a fair hearing because of the conduct of the Board's attorneys and the trial examiner who presided at the hearing at which the evidence in the case was taken.

8. Whether the court below was precluded from granting enforcement of the Board's order because of a proviso to the Board's appropriation for the current fiscal year which prohibits the Board from using any of its funds in connection with certain cases.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act and of the Labor-Federal Security Appropriation Act, 1944, are set forth in the Appendix, *infra,* pp. 29–34.

STATEMENT

On August 6, 1937, Transport Workers Union of America, C. I. O., filed a charge with the Board's appropriate regional director alleging that the Baltimore Transit Company had discriminatorily discharged one Brylke, in violation of Section 8 (1) and (3) of the Act (R. II, 799–801). On September 29, 1937, the regional director wrote the Company that he had decided to dismiss the charge for "lack of jurisdiction" (R. II, 801, 1219). On April 29, 1938, the assistant secretary of the Board advised the Transport Workers Union by letter that the Board had affirmed the regional director's refusal to issue a complaint and that, therefore, no complaint on its charges would issue (R. II, 1220). No further proceedings were taken with respect to the charges.

On March 5, 1942, the Amalgamated Association of Street, Electric Railway, and Motor Coach Employees of America, Division 1300 (A. F. of L.), herein called Amalgamated or the Union, filed charges with the Board initiating the instant proceedings (R. II, 1178–1179), and on June 2, 1942, the Board issued its complaint herein (R. II, 786–794). Neither Brylke nor Transport Workers Union is involved in these charges or complaint. There followed the usual proceedings under Section 10 of the Act (R. I, 23–26, 1–2), and on February 1, 1943, the Board issued its findings of fact, conclusions of law, and order (R. I, 1–152). The facts as found by the Board and shown by the evidence may be summarized as follows:

I. Nature of petitioners' operations [2]

Petitioners are Maryland corporations which operate the street railway and bus transportation system serving Baltimore and its environs (R. I, 157, 573–574; R. II, 786–787, 802).[3] With negligible exceptions, they furnish the only mass transportation facilities in the entire Baltimore area (R. I, 157–158, 162–164, 182–184; R. II, 824–855, 856; Bd. Exh. 28). They operate 22 bus lines and

[2] The Board's findings respecting petitioners' operations appear at R. I, 2, 27, 29–40. In the following statement all references, unless otherwise indicated, are to the supporting evidence.

[3] One of the petitioners, the Baltimore Transit Company, wholly owns and controls the other petitioner, the Baltimore Coach Company (R. I, 573–574, R. II, 787, 802).

some 30 streetcar lines, which serve practically every district of the city (R. I, 162–164; Bd. Exh. 28). At the time of the hearing, petitioners had 1,253 vehicles in active use (R. I, 162). In 1941 these vehicles carried 160,050,906 revenue passengers and travelled 34,042,730 vehicle-miles, and during the first 4 months of 1942 they carried 64,488,591 revenue passengers and travelled 12,235,627 vehicle-miles (R. II, 824–855, 856).

Much of petitioners' traffic is intimately connected and integrated with the industrial life of the Baltimore area. During the morning rush hours petitioners carry daily approximately 100,000 passengers to outlying industrial areas and approximately 90,000 passengers to the heart of the city where wholesale and manufacturing districts are located (R. I, 179–181, 187; Bd. Exh. 56). A substantial proportion of these passengers consists of employees going to and from their jobs in great industrial and manufacturing concerns which are directly engaged in interstate and foreign commerce. Thus, of 147,000 employees of 47 of the largest business enterprises in Baltimore, each of which is engaged in interstate commerce and many of which are vital to the national war effort, 45,000 depend upon petitioners' transportation facilities to bring them to and from work. These concerns include shipyards, railroads, oil companies, steel works, canning works, tin mills, food packers, glass works,

electrical and radio manufacturers, telephone services, electric light and power plants, and clothing factories; they are responsible for bringing into the State of Maryland annually goods valued at over $271,000,000 and shipping out of the State annually goods valued in excess of $500,000,000.[4]

Petitioners' facilities also transport passengers to and from the wharves, stations, and airports of interstate carriers (R. I, 162–163, 165, 167, 182–183; Bd. Exh. 28). In connection with their operations, petitioners annually bring or cause to be brought into the State of Maryland from other States substantial quantities of materials and supplies. In 1941 petitioners' purchases of machinery and equipment from outside the State were $2,353,455.96 (R. I, 154–155), their purchases of gasoline and oil, all of which originated outside the State, amounted to 1,698,280 and 313,976 gallons, respectively (R. I, 485–488), and they used 138,381,291 kilowatt-hours of electricity which they purchased from a producer that obtained 39

[4] The Board's findings as to the number of employees of each of the 47 concerns appear at R. I, 33–34. The supporting evidence for the findings in the above paragraph appears at R. I, 190–193, 195–197, 199–201, 206–208, 219–221, 231–234, 238–240, 247–248, 253–258, 260–264, 287–288, 294–295, 298–308, 320–324, 362–365, 384–386, 400–401, 412–442; R. II, 881–882, 890–891, 897–898, 900, 1028–1029, 1031–1032, 1052–1054, 1058–1060, 1068–1070, 1076–1082, 1091–1104, 1106–1107, 1109–1111, 1113–1114.

percent of its output from outside the State (R. I, 248–249, 296–298; R. II, 861–862, 864, 1071, 1072, 1074, 1075).

Upon the foregoing facts, the Board found that petitioners' unfair labor practices affect commerce within the meaning of the Act (R. I, 2, 144).

II. The unfair labor practices [5]

From 1918 to 1937, petitioners maintained and supported a labor organization of their employees, known as the Association.[6] Petitioners sponsored the formation of the organization (R. I, 585–586; R. II, 903–906, 913); took an active part in formulating its governing rules, which were subject to petitioners' approval (R. II, 904–905, 907–912, 913, 915–919, 922); and directly participated in the organization's management through, *inter alia,* selection of its secretary, treasurer, and *ex officio* members of its governing committee (R. II, 917, 920). Petitioners also granted the organization direct and indirect financial and other assistance in the form of monthly contributions of from $1,000 to $2,500 (R. II, 917, 933, 941–942), a check-off system of dues collection whereby membership in the Association carried

[5] The Board's findings respecting petitioners' unfair labor practices appear at R. I, 1, 2–4, 41–144.

[6] Until 1935, the full name of the organization was the United Railways Employees' Association of Baltimore, and thereafter it was styled the Baltimore Transit Employees' Association (R. I, 226; R. II, 948, 950).

with it authorization to petitioners to deduct dues from the employees' wages (R. I, 244, 326; R. II, 1038–1039),[7] and free use of company time, property, facilities, and from time to time legal counsel (R. I, 203–204, 206, 216–217, 227, 246, 315, 343, 554, 586, 701, 705; R. II, 903, 935, 942, 944, 945, 953, 962, 966–968).

The Independent [8] succeeded the Association in 1937, following the *Jones & Laughlin* decision.[9] It was organized under the leadership of members of the governing committee of the Association and with petitioners' undisguised support and approval (R. I, 700–706; R. II, 957–959), to meet the "emergency" [10] created by the concurrent enrollment of members among the employees by unions affiliated with the C. I. O. and the A. F. of L. (R. I, 314, 551–552, 761; R. II, 957). Certain illegal features of the predecessor were eliminated from the governing rules of the Independent (R. II, 893–896; Bd. Exh. 72), but it

[7] Petitioners agreed to defray all "expenses of carrying on the Association" except insofar as defrayed by membership dues and fees (R. II, 917).

[8] Independent Union of Transit Employees of Baltimore City.

[9] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, decided April 12, 1937.

[10] The characterization is that of General Manager Potter, who, in addressing the governing committee of the Association following initial steps to form the Independent, stated that he was "proud" of the way they had reacted to an "emergency" (R. II, 959).

was emphasized to the employees that the new organization was merely a "successor" of the old, that the latter's assets would be transferred to the Independent, and that the "existing rights" of the employees in the Association would not be "jeopardized" (R. II, 899). Continuity between the two organizations was almost complete, as to business (R. II, 962–965), meetings (R. II, 959, 962, 970), leadership (R. I, 215–216, 700; R. II, 965, 970), and recognition (R. I, 705), and the successor carried on in substantially the same manner as had the predecessor (R. I, 706; R. II, 962, 965–966).

Petitioners granted the Independent direct and indirect financial and other support such as had been previously granted the Association. Presidents and certain other officers of the Independent ceased to perform their regular duties as employees of petitioners upon election to office and thereafter devoted their entire time to the affairs of the Independent, but petitioners continued to pay them their usual wages (R. I, 197–199, 201; cf., 229–230). Petitioners permitted the Independent and its officers and representatives to conduct its affairs and meetings on company time and property (R. I, 197–199, 201, 203–206, 214–215, 235–237, 243, 246, 313–314, 550, 554, 576, 586, 704–706, 745–746; R. II, 1046) and to use company facilities (R. I, 227, 228, 342–343, 730). Petitioners financed picnics, pleasure trips

for officers, lobbying before legislative bodies (R. I, 209–212, 240–241, 282–285, 746; R. II, 994, 1010), and continued the system of dues collection by pay-roll deductions (R. II, 894–895; Bd. Exh. 75A).

Petitioners manifested opposition to "outside" unions, used the employees' "representatives" under the Independent as their own agents in furthering petitioners' anti-union policies, and unequivocally showed that they intended the employees to continue to adhere to and support the Independent. Thus, when several employees instituted movements to abandon the Independent and joined "outside" unions, petitioners' highest officials quickly came to the defense of the Independent, castigated the dissidents as "judases" and "b——" who were trying to destroy "what we have built up here," granted purposeful wage adjustments, and otherwise showed a fixed determination that the employees retain the Independent (R. I, 707–709, 753–754, 759–760; R. II, 974, 976–977, 979–980, 1009–1013, 1016–1020, 1025. Petitioners permitted five representatives of the Independent to be relieved of their duties as employees and to be specially assigned by the Independent to visit the car houses during working hours and on time paid for by petitioners, in order to "boost" the Independent and "discredit in every way possible" the "outside" unions (R. I, 745; R. II, 1014, 1020–1021). Petitioners spied

upon union activities,[11] and influenced the credit union functioning among the employees to deny a loan to one O'Connor, who was suspected of having joined an "outside" union. When O'Connor denied membership in the union and signed a statement presented by petitioners' attorneys to the effect that he had not joined and did not intend to join "any outside labor organization," the loan was granted.[12] Superintendent of Traffic Duval and Line Superintendent Wisner "cooperated" with representatives of the Independent in securing the adherence of new employees as they were hired (R. I, 244–245, 285–286, 550). At the time of the hearing only three of petitioners' approximately 3,000 employees were not members of the favored organization (R. I, 506, 546).

Petitioners discharged 10 employees who were outstanding and unintimidated advocates of organization of the employees in "outside" labor unions.[13] Most of the men in question had long

[11] The Board's findings in this regard appear at R. I, 59–62, 66, 67, 71, and the evidence supporting the Board's findings appears at R. I, 552–557, 706–708, 672–674, 584–585; R. I, 472–473; R. I, 442–444, 478, 495–496, 499–500, 509).

[12] The Board's findings respecting this incident appear at R. I, 85–87, and the supporting evidence at R. I, 754–758.

[13] The pertinent evidence in the case of each of the 10 is set forth in the Board's decision (R. I, 62–144). Petitioners have not attacked the Board's findings by reference to any specific evidence, and since it would unduly lengthen this

records of satisfactory service, some exceeding 20 years.[14] Upon their union activity becoming known, however, in every case except one (Silberzahn), their deportment records immediately suffered an extraordinary deterioration and numerous complaints of violations of company rules were filed against them.[15] No other cases of discharges during the years 1940 to 1942 followed a pattern like that of the discharges in question.[16] Supervisory employees made anti-union statements to some of the men discharged and in some instances suggested to the employees that their union activities were responsible for the dismissals.[17]

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brief to set it forth, we do not mention it but refer briefly to the more significant over-all considerations disclosed by the record.

[14] Perry had worked for petitioners since 1919 (R. I, 324), Peacock since 1920 (R. II. 1177; R. I, 715), Rawlings and Pennington since 1922 (R. I, 470, 259), Mueller since 1923 (R. I, 453–454), McHenry since 1927 (R. I, 392; R. II, 1164), Strupp since 1928 (R. I, 368; R. II, 1163), May and Silberzahn entered petitioners' employ in 1940 (R. I, 488–489, 497–498; R. II, 1144), and Flaherty in 1941 (R. II, 1166).

[15] May: R. II, 1209–1210; Rawlings: R. II, 1233–1237, R. I, 476; Pennington: R. II, 1190–1192; Perry: R. I, 348–349; R. II, 1195–1197; Strupp: R. II, 1198–1199; Flaherty: R. II, 1231–1232; McHenry: R. II, 1200–1204; Mueller: R. II, 1206–1208; Peacock: R. I, 735–736, R. II, 1245–1247.

[16] See a table which the trial examiner prepared (R. I, 64–65), summarizing the evidence with respect to these other discharges (R. I, 560–572; R. II, 1126–1177).

[17] E. g., May: R. I, 492–493; Pennington: R. I, 268–269, 273, 522–523, R. II, 1012–1013; Perry: R. I, 358–359, R. II,

On January 1, 1942, petitioners entered into a wage agreement with the Independent (R. III, 513–516) and on January 18, 1942, an agreement concerning working conditions (R. III, 496–513). Petitioners have had annual agreements with the Independent or its predecessor since 1919 (R. I, 53–54; R. II, 924–930, 1045–1051).

The Board concluded that by the foregoing acts petitioners had committed unfair labor practices, in violation of Section 8 (1), (2), and (3) of the Act (R. I, 2, 3, 4, 58–59, 62, 144, 148). It ordered petitioners to cease and desist from these unfair labor practices; to cease giving effect to their agreements with the Independent; to disestablish that organization as bargaining representative; to reinstate the employees discriminated against, with back pay from June 2, 1942, the date of issuance of the Board's complaint; [18] to reimburse all employees for

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1012–1013; Strupp: R. I, 370–373, 377–382, 597–598, R. II, 1215; Flaherty: R. I, 405; Peacock: R. I, 731–733.

During an earlier organizational drive by Amalgamated, Superintendent of Traffic Duval had questioned the employees who joined Amalgamated and declared that if they did the "right" thing they would have steady jobs (R. I, 707–708). Thereafter, the employees ceased to attend meetings of that organization and the charter was surrendered (R. I, 708–709, 754, 760, 762). It was during this earlier period, too, that the Transport Workers Union was conducting organizational activities, in connection with which Brylke was discharged and the charges which the Board dismissed for lack of jurisdiction were filed (p. 4, *supra*).

[18] One employee, Peacock, was in the armed forces, and the Board accordingly directed petitioners to offer him reinstatement upon application within 40 days after his discharge from the armed services (R. I, 7).

dues checked off from their wages since June 2, 1942; and to post the usual notices of compliance (R. I, 5–8).

On May 20, 1943, the Board filed its petition for enforcement in the court below (R. III, 476–481). On August 27, 1943, petitioners filed a motion requesting the court to stay the proceeding during the period in which the Labor-Federal Security Appropriation Act, 1944, would be effective (R. III, 493–495). On October 5, 1943, the court below denied petitioners' motion without opinion (R. III, 524). On January 10, 1944, the court handed down its decision (R. III, 526–538) and entered its decree (R. III, 538–539) enforcing the Board's order, with a modification not here in issue.

ARGUMENT

1. Petitioners' principal contention is that the Act does not apply to their operations (Pet. 5–6, 8–11, 16–23). The court below, upon a consideration of the facts herein and the principles announced in recent decisions of this Court, stated (R. III, 529) that "there can be no doubt that the provisions of the act are applicable to the company's business." We believe that no other result is possible. Moreover, the court's holding raises no conflict with decisions of other circuit courts of appeals.

The test of the Board's jurisdiction under the Act is satisfied in any case where it appears that "stoppage of" the employer's "operations by in-

dustrial strife" would result in substantial interruption to or interference with the free flow of interstate commerce. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 41. Where such obstruction would occur, the Court held, the employer's unfair labor practices, shown by long experience and the Congressional findings announced in the Act (Section 1) to be "prolific causes" of industrial strife, have a "close and intimate relation" to interstate commerce and are subject to federal regulation under the Act (301 U. S. at pp. 42, 43). This test is fully met in the instant case.

A cessation or restriction of petitioners' operations by industrial strife would inevitably entail widespread and drastic effects upon interstate commerce. Petitioners annually draw or cause to be drawn into the State of Maryland through the channels of interstate commerce large quantities of materials and supplies which they use in their business. In 1941, these movements involved machinery and equipment valued at over $2,300,000, over one and one-half million gallons of gasoline, over 300,000 gallons of oil, and substantial quantities of electrical energy. This commerce alone brings petitioners' operations within the Board's competence to protect against interruptions or interference which flow from unfair labor practices. *Newport News Shipbuilding & Dry Dock Co.* v. *National Labor Relations Board,*

101 F. (2d) 841, 843 (C. C. A. 4), modified in other respects, 308 U. S. 241; *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 115 F. (2d) 414, 416 (C. C. A. 4), affirmed in this respect, 314 U. S. 469, 476; *National Labor Relations Board* v. *J. L. Hudson Co.*, 135 F. (2d) 380 (C. C. A. 6), certiorari denied, October 11, 1943, No. 114, this Term. Cf., *Local 167* v. *United States*, 291 U. S. 293, 297; *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, 290–291.

A further basis for the Board's jurisdiction is the serious effect the stoppage of petitioners' operations by industrial strife would have upon the many important interstate industries in the great Baltimore industrial area whose workers are transported to and from work on petitioners' trolley cars and buses.[18a] As the court below stated (R. III, 529):

> * * * Baltimore * * * industry is largely engaged in the production of goods for and the transportation of goods in interstate commerce; * * * the proper func-

[18a] Petitioners' officials have repeatedly emphasized in annual reports and other documents that "most workers in defense industries use streetcars or busses to get to work" (Bd. Ex. 49); that Baltimore Transit Company "furnishes all of the public transportation in Baltimore and the surrounding suburbs including the only service to practically all of the important defense industries * * *" (Bd. Ex. 181C); that petitioners are "as important as the Pennsylvania Railroad" (Bd. Exs. 88 DDD–EEE); and that petitioners constitute one of the seven most important industries in the war effort (Bd. Exs. 88 FFF–GGG).

> tioning of the industrial life of such a city is dependent to a large extent upon the transportation furnished by its streetcars and buses; and * * * a tie-up of this means of transportation would in large measure paralyze the life of the city and greatly hinder and impede the flow of the interstate commerce in which the people of the city are engaged.

If petitioners' streetcars and buses cease to run, thousands of workers, employed in great shipyards, steelworks, tin mills, meat packing plants, airplane manufacturing plants, railroads, and other large interstate enterprises, would be unable to reach their places of employment in their usual manner. Such a shutting off of these employees from their jobs obviously would hinder or curtail the production of goods and the interstate flow of large volumes of materials for which these enterprises are responsible. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 41; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197; cf. *National Labor Relations Board* v. *Bank of America Ass'n*, 130 F. (2d) 624, 626 (C. C. A. 9), certiorari denied, 318 U. S. 791. An interruption of petitioners' transportation system would further affect interstate commerce in that the access which petitioners' facilities provide to interstate shipping wharves, railroad terminals, and airplane lines would be impaired. *Butler Bros.* v. *National Labor Relations Board*, 134 F.

(2d) 981 (C. C. A. 7), certiorari denied, November 22, 1943, No. 274, this Term; *National Labor Relations Board* v. *Carroll*, 120 F. (2d) 457, 458 (C. C. A. 1); cf. *Kirschbaum* v. *Walling*, 316 U. S. 517. Since a stoppage of petitioners' operations would thus exercise "a substantial economic effect on interstate commerce" (*Wickard* v. *Filburn*, 317 U. S. 111, 125), the Act is clearly applicable.[19]

2. Petitioners contend (Pet. 6–7, 11–12, 24–29) that the Board is precluded from remedying and restraining their unfair labor practices because several years before commencement of the instant proceedings the Board administratively affirmed its regional director's refusal, for asserted "lack of jurisdiction" over petitioners' business, to issue a complaint against petitioners on charges alleging unfair labor practices not involved in this proceeding and filed by a labor organization other than the one filing the charges in the case at bar (Statement, p. 4, *supra*). The court below saw "no merit whatever" in the contention (R. III, 530), and its view is clearly correct.

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[19] *McLeod* v. *Threlkeld*, 319 U. S. 491, and *Higgins* v. *Carr Bros. Co.*, 317 U. S. 572, which petitioners claim are inconsistent with the holding of the court below in the case at bar (Pet. 9), arose under the Fair Labor Standards Act. As the Court pointed out in its opinions in those cases, that act is "more narrowly confined" than the National Labor Relations Act, which "extended federal control to business 'affecting commerce'." The *Higgins* case, 317 U. S. 572, 574; the *McLeod* case, 319 U. S. 491, 493.

Contrary to petitioners' contention (Pet. 24–26), the Board's prior refusal to issue a complaint for an assumed lack of jurisdiction was not an adjudication of the jurisdictional question, but merely "an administrative determination not to take action" (opinion of court below, R. III, 530–531).[20] It is well settled that the principle of *res adjudicata* has no application to the exercise by administrative agencies of their purely administrative powers and duties. *Pearson* v. *Williams*, 202 U. S. 281; *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, 445; *State Corp. Comm'n* v. *Wichita Gas Co.*, 290 U. S. 561, 569; *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 64.

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[20] All of the cases which petitioners cite (Pet. 25–26) involve final judgments or orders of a court or administrative body determining the rights of litigants; they do not involve administrative refusals to take action such as is involved in the instant case. Contrary to petitioners' assertion (Pet. 24, 26), such an administrative refusal to act is not a reviewable final order under Section 10 (f) of the Act. *Marine Engineers' Beneficial Ass'n* v. *National Labor Relations Board* (not reported), decided April 18, 1943 (C. C. A. 2), certiorari denied, October 25, 1943, No. 357, this Term; *Progressive Mine Workers of America* v. *National Labor Relations Board* (without opinion), October 22, 1940, 3 Labor Cases, Par. 60, 133 (App. D. C.); *White* v. *National Labor Relations Board, per curiam*, December 11, 1941 (App. D. C.). See also *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, 406–409; *Federal Power Comm.* v. *Metropolitan Edison Co.*, 304 U. S. 375, 384, 387. Cf. *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 18; *Jacobsen* v. *National Labor Relations Board*, 120 F. (2d) 96, 100 (C. C. A. 3); *National Labor Relations Board* v. *Barrett Co.*, 120 F. (2d), 583, 586 (C. C. A. 7).

Moreover, even if the Board's administrative action could be regarded as an adjudication as to jurisdiction, petitioners' reliance upon it would be misplaced. As the court below stated (R. III, 531):

> An administrative agency, charged with the protection of the public, is certainly not precluded from taking appropriate action to that end because of mistaken action on its part in the past. Cf. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 145; *Houghton* v. *Payne*, 194 U. S. 88, 100. Nor can the principles of equitable estoppel be applied to deprive the public of the protection of a statute because of mistaken action or lack of action on the part of public officials. *United States* v. *San Francisco*, 310 U. S. 16, 32; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 409; *United States* v. *City of Greenville*, 4 cir. 118 F. (2d) 963, 966.

3. Petitioners contend (Pet. 7, 28, 30) that, in any event, the Board should have limited the payment of back pay and checked-off dues reimbursement [21] to February 1, 1943, the date when the Board's decision and order issued, and not, as it did (R. I, 4, 5, 7), to June 2, 1942, the date when the Board issued its complaint herein. But,

[21] We discuss at pp. 22–23, *infra*, petitioners' contention that any checked-off dues reimbursement provision was beyond the Board's power in the circumstances of this case.

obviously, it was on June 2, 1942, when the Board took administrative action contrary to its earlier refusal to issue a complaint, that petitioners were advised that the Board was no longer adhering to its earlier position as to jurisdiction. There is nothing unreasonable in holding petitioners to account for their continued misconduct after that date.

4. Petitioners' contention that the Board's findings as to the unfair labor practices are not supported by substantial evidence (Pet. 8, 13, 30–31) presents no question of general importance. Moreover, the evidence summarized in the Statement (*supra*, pp. 8–14) affords full support for the challenged findings, as the court below properly held (R. III, 532, 533–535).

5. Petitioners' contention (Pet. 7, 12, 29, 30), that the Board improperly ordered petitioners to reimburse their employees for moneys checked off from their wages as dues to Independent, likewise presents no question of general importance. This Court recently sustained the Board's power to issue such an order in *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U. S. 533.[22] The Board correctly applied the

[22] The decisions of the circuit courts of appeals which petitioners cite (Pet. 12, note 2) as in conflict with the holding below were rendered before this Court's decision in the *Virginia Electric* case. In the only subsequent circuit court of appeals decision (*National Labor Relations Board* v. *Cassoff*, 139 F. (2d) 397), the Second Circuit Court of Appeals enforced *per curiam*, 43 N. L. R. B. 1193, ordering the employer

principles of the *Virginia Electric* case to the particular facts of the instant case. As the court below pointed out (R. III, 537), the absence of a closed-shop contract such as existed in the *Virginia Electric* case is not conclusive; the test is whether it may fairly be said that the employees, in joining the dominated organization and in "agreeing" to the deduction of dues from their wages, exercised a free choice or acted under compulsions exerted by the employer for its own unlawful purposes. See the *Virginia Electric* case at pp. 541–544. This test is fully met here. In the circumstances reviewed in the Statement (pp. 8–14, *supra*), the employees were just as firmly bound to support the Independent, by which petitioners foreclosed their right to freedom of self-organization, as if their jobs literally depended on it;[23] and petitioners, by granting check-off privileges, just as firmly fastened upon the employees the cost of maintaining it.

6. Petitioners contend (Pet. 7, 12, 29–30) that the Board abused its discretion in ordering them to post notices stating without more that their employees are free to become or remain members of the particular labor organizations which petitioners had opposed, and that petitioners will

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to reimburse employees for dues checked off to an A. F. of L. union which the employer had assisted in violation of Section 8 (1) of the Act.

[23] The court below stated (R. III, 537): "* * * circumstances disclosed by the evidence here practically made membership in Independent compulsory."

not discriminate against the employees because of membership or activity in those organizations. But it clearly was not an abuse of the Board's discretionary power in determining how the effects of petitioners' unfair labor practices might be expunged to require petitioners to notify their employees that they were free to adhere to the particular labor organizations against which petitioners' discriminatory conduct had been directed. On the contrary, this provision seems peculiarly "adapted to the situation which calls for redress." *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 348. While several circuit courts of appeals have, in cases cited in the petition for certiorari (Pet. 12, note 3), required the inclusion in the Board's notices of a further statement in substance that the employees are free to join any union they choose,[24] these courts have in other cases enforced provisions identical with the one here chal-

[24] The *Westinghouse*, *Standard Oil*, and *Elizabeth Arden* cases cited in the petition are decisions of the Circuit Court of Appeals for the Second Circuit; the *Weirton Steel*, *Baldwin Locomotive Works*, and *Roebling* cases are Third Circuit Court of Appeals decisions; the *American Rolling Mill* case, *New Idea, Inc.*, *Precisions Castings*, and *Cleveland-Cliffs Iron Co.* were decided by the Sixth Circuit Court of Appeals; the *Reliance Mfg. Co.* case, by the Seventh Circuit Court of Appeals; the *Harbison-Walker Refractories Co.* case, by the Circuit Court of Appeals for the Eighth Circuit; and *Colorado Fuel & Iron Corp.*, by the Tenth Circuit Court of Appeals. See also *Cudahy Packing Co.* v. *National Labor Relations Board*, 102 F. (2d) 745, 753 (C. C. A. 8), certiorari denied, 308 U. S. 565.

lenged.[25] This indicates that these courts have adopted no hard and fast rule but vary their decision according to the facts presented. Even if the instant decision may be regarded as conflicting with these decisions, the numerous minor changes made by the courts in the wording of Board notices do not appear to raise issues of sufficient importance to warrant the granting of a writ of certiorari. The employer in *National Labor Relations Board* v. *Aintree Corp.*, 132 F. (2d) 469 (C. C. A. 7), raised the same question in its petition for certiorari (No. 702, October Term, 1942, Pet. 3, 17–18, 23, 25–27), but the petition was denied, 318 U. S. 774.

7. Petitioners contend (Pet. 8, 13, 31) that they were denied a fair hearing because of the conduct of the Board's attorneys and the trial examiner who presided at the hearing at which the evidence in the case was taken. In support of their contention petitioners refer the Court to their excep-

[25] E. g., *National Labor Relations Board* v. *Regal Knitwear Company*, decided February 15, 1944 (C. C. A. 2), enforcing 49 N. L. R. B. 560, 562; *National Labor Relations Board* v. *Poultrymen's Service Corp.*, 138 F. (2d) 204 (C. C. A. 3), enforcing 41 N. L. R. B. 444, 467; *National Labor Relations Board* v. *American Creosoting Company, Inc.*, 139 F. (2d) 193 (C. C. A. 6), enforcing 46 N. L. R. B. 240, 261; *National Labor Relations Board* v. *Barrett Co.*, 135 F. (2d) 959 (C. C. A. 7), enforcing 41 N. L. R. B. 1327, 1352–1353; *Carter Carburetor Corporation* v. *National Labor Relations Board*, decided February 21, 1944 (C. C. A. 8), enforcing 48 N. L. R. B. 354, 361; *National Labor Relations Board* v. *Denver Tent and Awning Co.*, 138 F. (2d) 410 (C. C. A. 10), enforcing 47 N. L. R. B. 586, 587–588.

tions Nos. 168 to 191 lodged with the Board to the trial examiner's intermediate report (Pet. 31). A reading of the record as a whole and of the appendix to the Board's decision, in which the Board fully discussed the exceptions (R. I, 8–22), shows, however, that petitioners in fact received a full and fair hearing and that their exceptions are wholly lacking in substance.

8. Finally, petitioners contend (Pet. 8, 13, 31–32) that the proviso attached to, and limiting the Board's use of, its current appropriation [26] precludes enforcement of the Board's order. The court below properly characterized this contention as "so lacking in merit as not to warrant discussion" (R. III, 538). It stated that "It is manifest that a limitation upon spending by the Board may not be construed as a limitation upon the jurisdiction of this Court to enforce a Board order" (*ibid.*). Other circuit courts of appeals have been uniformly of the same view.[27]

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[26] "No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor which has been in existence for three months or longer without complaint being filed * * *" (Labor-Federal Security Appropriation Act, 1944, Act of July 12, 1943, Public Law No. 135, 78th Congress, 1st Session; Title IV, National Labor Relations Board Appropriation Act, 1944).

[27] *National Labor Relations Board* v. *Elvine Knitting Mills, Inc.*, 138 F. (2d) 633 (C. C. A. 2); *National Labor Relations Board* v. *National Tool Co.*, 139 F. (2d) 490 (C. C. A. 6); *National Labor Relations Board* v. *Cowell Portland Cement Co.* (without opinion), decided September 7, 1943 (C. C. A. 9).

Moreover, the proviso does not apply to the instant case. It affects only cases where an agreement "has been in existence for three months or longer without complaint being filed." The word "complaint" obviously means the charge filed "with the National Labor Relations Board" by "management" or "employees," not the pleading with which the Board institutes its action. See the statements of the sponsor of the proviso during the Congressional debate. 89 Cong. Rec. 5958–5959; see also *id.*, 6567, 6951. The Comptroller General, who enforces legislative restrictions upon appropriations, has ruled specifically in this connection (Decision No. 35803, rendered July 29, 1943 (unreported)) that the proviso—

> limits the use of funds to those cases in which *charges have been filed with the Board* within three months of the execution of a labor agreement, but prescribes no limitation as to the time within which a complaint may be issued by the Board. [Italics supplied.]

The contracts involved in the instant case were executed on January 1 and 18, 1942, respectively (R. III, 494, 496–516, 518); the charge initiating the proceedings was filed within three months, on March 5, 1942 (R. II, 1178–1179), not on June 1, 1942, as petitioners assert Pet. 32. Petitioners refer apparently to a second amended charge filed on June 1 (R. II, 783), but this did not change the

essential nature of the proceeding as set forth in the charge originally filed.

Moreover, the Board's decision and order herein were issued on February 1, 1943 (R. I, 1–8). The proviso applies to the year beginning July 1, 1943. The Comptroller General has properly ruled (Decision, *supra*) that the proviso does not preclude the Board from—

> expending from its appropriation such amounts as may be necessary in connection with further proceedings in those cases as to which a decision and order were issued by the Board prior to July 1, 1943.

CONCLUSION

For the foregoing reasons, it is respectively submitted that the petition for a writ of certiorari should be denied.

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